

Issues: Group III Written Notice (engaging in conduct that undermines the agency's effectiveness) and Suspension; Hearing Date: 03/20/09; Decision Issued: 03/23/09; Agency: VSP; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9026; Outcome: Full Relief.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9026

Hearing Date: March 20, 2009
Decision Issued: March 23, 2008

PROCEDURAL HISTORY

On October 27, 2008, Grievant was issued a Group III Written Notice of disciplinary action with five days suspension. The offense was engaging in conduct, whether on or off the job, that was considered to have undermined the effectiveness or efficiency of the Agency's activities. The offense occurred on February 4, 2008, when statements were allegedly made in court. Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 23, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on January 27, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, March 20, 2009. Because of the scheduling unavailability documented by counsel for the grievant, for good cause shown, the time for conducting the grievance hearing was extended. The grievance hearing was held on March 20, 2009, at the Agency's regional office.

The Agency submitted an exhibit notebook with numbered exhibits that were, over objection from the Grievant to inadmissible hearsay, admitted into the grievance record and will be referred to as Agency's Exhibits, numbered respectively. The Grievant submitted one document, a diagram of the courtroom. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Counsel for Grievant
Three witness for Grievant (including Grievant)
Advocate for Agency
Representative for Agency
One witness for Agency (including Representative)

ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests rescission or reduction of the Group III Written Notice or, alternatively, reduction.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency has promulgated General Order No. 17, General Rules of Conduct. Additionally, the Agency has promulgated General Order No. 19, Separation from the Service

and Disciplinary Measures, which defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence should normally warrant removal. Group III offenses include engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the department's activities. This offense includes actions which might impair the department's reputation as well as the reputation or performance of its employees. Agency Exhibit E.

The Offense

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as state trooper for 27 years. The Agency received an anonymous complaint, in June 2008, about statements the grievant allegedly made on February 4, 2008, in a general district courtroom to a general district court judge about the whereabouts of other troopers who were subpoenaed to appear in court. Apparently, the absent troopers had left to join a highway pursuit.

A captain in the Agency described the investigation that led to the discipline. Based on the anonymous complaint, an investigation was conducted by Internal Affairs, with a report dated August 5, 2008. In the report, interviews of multiple witnesses were included, including the presiding judge in the courtroom. Neither the investigator nor any of the interviewed witnesses testified at the grievance hearing. Other interview accounts vary, but based on the investigation interview, the judge was certain that the conversation with the grievant was a private one between the two of them, not public, and that only the court clerk and sheriff's deputies were present. The judge may have asked the grievant to confirm the whereabouts of the absent troopers, and, according to the investigation interview, the judge recalled the grievant relaying to him that the pursuit the absent troopers were involved in was an elective one. Contrary to other allegations, the judge did not recall the grievant describing the absent troopers' conduct as disgraceful or unprofessional.

The investigation also uncovered the fact that one of the troopers who was subject of the courtroom discussion, Trooper M, learned of the grievant's conversation with the judge and complained to the grievant's supervisor, Sergeant G, within a few day of February 4, 2008. According to Trooper M's investigation interview, Sergeant G indicated to Trooper M that he would address the complaint with the grievant. However, Sergeant G did not contact the grievant about Trooper M's complaint, and the grievant first learned of the complaint about his behavior when contacted by internal affairs following the anonymous complaint made in June 2008.

The grievant testified consistently with his investigation interview. The grievant's version is essentially that the judge asked him to confirm the whereabouts of the missing troopers; the grievant tried by telephone to contact them through the division's dispatch, but the troopers were not in contact with dispatch; and that the grievant deferred to supervision for any

further inquiry by the judge. The grievant also testified that Trooper M harbored a distinct dislike for the grievant.

The Agency's captain testified that he issued the Group III written notice because he considered the grievant's conduct and subject matter a serious issue. The supervisor testified that, after considering the circumstances of the investigation results and the grievant's story, he felt the discipline was warranted. However, at the grievance hearing, the captain volunteered that, upon further consideration, he was prepared to negotiate or accept a lesser discipline in this matter.

An assistant commonwealth's attorney testified to the grievant's stellar reputation for truthfulness and competence. A master trooper also testified to the grievant's good professional character.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293,299 (4th Cir. 1988).

Pursuant to applicable policy, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

However, one of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of employees and attempt to correct the performance or behavior *immediately*. Agency Exhibit E. Section 7.b, General Order 19, *Separation from the Service and Disciplinary Measures*, revised July 1, 2007. When issuing the employee a Written Notice Form for a Group III offense, *management should issue notice as soon as practicable*. Agency Exhibit E. *Id.* at Section 14.c (1). One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. The hearing officer takes administrative notice that unless an extensive, detailed investigation is required, most state agencies issue disciplinary actions within days or, at most, a few weeks after commission of an offense.

When an agency delays imposition of discipline for an extended time, it gives the appearance that the offense is not serious. In an appropriate case, a hearing officer may give

consideration to reducing the level of discipline where the agency's delay in the issuance of discipline is sufficiently egregious as to negate the alleged seriousness of the offense. *See, e.g.*, Decision of Hearing Officer, EDR Case Number 801, issued August 26, 2004. A hearing officer may not direct an agency on how to conduct its business, however, when an agency delays the imposition of discipline for an extraordinarily long time, such delay will be considered an extenuating circumstance that can mitigate the level of discipline imposed. Although there is no bright line test, the facts in this case dictate that supervision's initial failure in responding and the extended delay in issuance of discipline constitute a prejudicial and mitigating failure to comply with policy.

DECISION

The agency has not shown, by a preponderance of evidence, that grievant's conduct in court on February 4, 2008, rose to a level justifying the disciplinary action of a Group III Written Notice. The only witness to the actual facts testifying, under oath, at the grievance hearing, and subject to cross-examination or a determination of credibility, was the grievant himself. The Agency conceded that the conduct admitted to by the grievant would not justify the discipline. While the hearsay facts included in the investigation report are admissible under the grievance procedure, the investigator who wrote the report did not testify. Thus, I find the weight of the investigation report and the hearsay statements contained therein are not sufficient to bear the burden of proving the discipline was warranted and appropriate. The thread of consistency this hearing officer finds in the evidence presented is that the grievant, when asked by the judge, responded in a way that conveyed his own disappointment that the troopers who were expected in court were not present. Accordingly, the discipline must be rescinded. Nonetheless, given all of the circumstances in this case, counseling is warranted to emphasize the importance of a trooper's proper, professional response to inquiries about the department or other troopers.

The disciplinary action of the agency is reversed. The Group III Written Notice and five-day suspension are hereby **RESCINDED**. The agency shall reimburse grievant for the five-day suspension and restore any benefits lost during the suspension period.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer